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No. 75-375

In the
Supreme Court of the United States
OCTOBER TERM, 1975

WHITE FARM EQUIPMENT COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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1. The Commissioner's brief and the brief filed by Amerada Hess Corporation ("Hess") in companion case No. 75-558 do not focus on the basic question. The issue is not whether listed stock should be valued by its exchange price. Rather, the issue is whether the trier of fact can value listed stock by the value assigned to the stock in an arm's length agreement between knowledgeable parties, which value was supported by other strong evidence of value. Stated differently, is the trier of fact,

as a matter of law, compelled to value listed stock solely by its exchange price even though the parties valued the stock at a price different than the exchange price?

White Farm Equipment Company's ("White Farm") petition ("Pet.") at 11-14 cites numerous cases where courts have valued listed stock by the value assigned the stock in an arm's length agreement rather than by the exchange price. The rationale of these decisions is that the parties' arm's length agreement is the primary evidence of fair market value since it involves an actual transaction between a willing seller and a willing buyer. (Pet. at 11).

The briefs of the Commissioner and Hess ignore the rationale of these cases. Their position rests primarily on estate and gift tax cases where no transfer of the shares was contemplated and where the courts logically valued the shares by the exchange price. *None* of the cases relied upon by the Commissioner and Hess involved transactions where knowledgeable parties dealing at arm's length agreed on the fair market value of the stock as in this transaction.* These cases, accordingly, are not in point and do not control the present transaction.

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*The Commissioner and Hess in their briefs suggest that the price assigned by the parties to the stock in their agreement was a "formula price." To the extent this phrase suggests that there was less than clear agreement on the value of the stock it is completely unfounded. See paragraph 8 of the parties' agreement reproduced in 61 T.C. at 200; Pet. App. at 55a-57a. The Tax Court found that the parties to the transaction unequivocally equated the $48.50 value assigned to the stock with cash. The parties agreement therefore constituted the fair market value of the White stock, *i.e.*, the price a willing buyer would pay to a willing seller, neither being obligated to buy or sell and both having reasonable knowledge of the relevant facts. (See Pet. at 11).

It is interesting to note that the Commissioner in opposing certiorari in *Seas Shipping Company, Inc.* v. *Commissioner,* 371 F.2d 528 (2d Cir.,) *cert. denied,* 387 U.S. 943 (1967) (*"Seas"*), argued that where parties with adverse interests agree on the dollar value of property, such agreement is very persuasive evidence of value. The Commissioner's positions before this Court in *Seas* and in this case are difficult to reconcile.

2. The Commissioner in his brief at 5-6 and Hess in its brief at 7-9 attempt to distinguish *Seas* from this case. Each of the alleged distinctions has been anticipated by White Farm and is discussed in its petition at 8-10.

By alleging irrelevant distinctions, the Commissioner and Hess attempt to divert the Court's attention from the basic premise that produces the conflict between *Seas* and this case. In *Seas,* the Second Circuit upheld the Tax Court's valuation of stock by a method other than the exchange price because a large block of stock was involved and the method of valuation used by the Tax Court was not clearly erroneous. In this case, the same criteria exist but the Third Circuit took the opposite course. Such conflicting results are not warranted in these cases which the Tax Court correctly described as "strikingly similar." 61 T.C. at 207; Pet. App. at 68a.

3. As pointed out in Judge Hunter's dissent in this case and in White Farm's petition at 15-19, there is no basis in logic nor any authority for a hypothetical blockage discount of approximately $2.4 million or a hypothetical selling expense discount of approximately $1.2 million. The decision of the Third Circuit is in direct conflict with the decisions of this Court, all Circuit Courts of Appeal which have dealt with the blockage issue and the Court of Claims. The Commissioner and Hess in their briefs completely ignore these points. In both briefs, the discussion of this issue is treated in one short paragraph conspicuously devoid of any legal citations.

The entire argument of the Commissioner and Hess is that the Third Circuit was justified in applying blockage because securities experts so testified. As pointed out in Judge Hunter's dissent and in White Farm's petition, as a matter of law, blockage is not applicable in this situation where, *inter alia*, there was a willing buyer and a willing seller. Additionally, White Farm, through cross-examination of the witnesses, discredited the testimony of the experts. Pet. App. 35a-36a. The Tax Court, therefore, properly rejected the testimony of the experts. Pet. at 17, n.10. There was, accordingly, no basis for the amount of blockage determined by the Third Circuit.

Furthermore, in arguing for blockage the Commissioner has reversed a heretofore consistent stance against the application of a blockage discount in valuing listed stock. See *Rushton* v. *Commissioner*, 498 F.2d 88, 90-92 (5th Cir. 1974); *Seas, supra* at 530; *Champion* v. *Commissioner*, 303 F.2d 887, 890 (5th Cir. 1962); *Bartol* v. *McGinnes*, 185 F.Supp. 659, 661 (E.D. Pa. 1960). See also cases cited in Pet. at 16.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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